



IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MICHIGAN CITIZENS
FOR AN INDEPENDENT PRESS, et al.,
Petitioners,

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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April 19, 1989

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Respondents make two basic points in urging this Court not to grant review. First, they argue that the "*Chevron* issue" was not decided by the Court below, and that this case is therefore not an appropriate one for deciding whether *Chevron* permits administrative agencies to interpret statutes inconsistently with firmly established rules of statutory construction. See *Chevron, USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Second, respondents argue that the issue that petitioners have raised under the Newspaper Preservation Act ("NPA") is fact-bound and not appropriate for review. Although both arguments are addressed in our opening brief, we reply briefly below.

1. Contrary to respondents' claim, the court below decided the *Chevron* issue. This is most apparent from Judge Ruth B.

Ginsburg's dissent, in which she observed that the case raises the question of whether *Chevron* did "indeed uproot a guide . . . to the antitrust law," namely the "well-recognized rule that antitrust exemptions must be narrowly construed." Pet. App. 195a-96 & n.6, citing *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 478 (9th Cir.), cert. denied, 464 U.S. 892 (1983), and *Group Life & Health Insurance Co., v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). She also raised the question of whether "[u]nder *Chevron*, it is the Attorney General's prerogative to construe an ambiguously phrased antitrust law expansively." Pet. App. 196a n.6. "The answer to these questions," according to Judge Ginsburg, "unless and until Higher Authority tells us unambiguously otherwise, must be 'No.'" Id.

The panel majority restated Judge Ginsburg's argument as "suggest[ing] that the Attorney General's statutory construction is impermissible because it did not employ the interpretative canon that exemptions to the antitrust laws—like all exemptions—should be construed narrowly." Pet. App. 180a. Its answer was that *Chevron* "implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency interpretations of ambiguous statutes." Pet. App. 180a (emphasis in original). Underscoring its ruling on the *Chevron* issue, the panel majority declared that "[i]f a statute is ambiguous, a reviewing court cannot reverse an agency decision merely because it failed to rely on any one of a number of canons of construction that might have shaded the interpretation a few degrees in one direction or another." Finally, the first line in the panel majority's concurrence in the denial of rehearing *en banc* chided the dissenters for overlooking "*Chevron*'s restraining leash." Pet. App. 200a. Thus, the *Chevron* issue was addressed and decided by the court below, as the Attorney General acknowledged in his statement of the case. Opposition 10.

The Attorney General does not seriously dispute the impor-

tance of the *Chevron* issue that petitioners have raised. Nor could he, since, as we pointed out in our opening brief, this Court has long relied on rules of statutory construction in reviewing agency decisions. See Petition 15-17. Thus, if the decision below is permitted to stand, agencies will be free to disregard rules of statutory construction, even those as specific and as entrenched as the rule at issue here.¹

2. On the NPA issue, respondents argue that the question presented by petitioners is fact-specific and therefore should not be reviewed by this Court. However, as we explained in our petition, the key to the Attorney General's opinion was his conclusion that the applicants were entitled to a joint operating arrangement ("JOA") if the newspaper designated as "failing" could show that it had suffered losses for a number of years and had no "unilateral way out" of its loss position. Petition 20-21.²

¹The Attorney General did assert that there is no authority for petitioners' claim that "the court of appeals recognized that the Attorney General's reading of the Act was a departure from past practice and inconsistent with the canon of construction upon which they rely." Opposition 13 n.13. In fact, these issues are discussed in the panel's opinion at Pet. App. 178a, 180a.

²This is also how the Attorney General initially described the case in the court of appeals. He argued that:

The record indisputably shows that the *Free Press* has in recent years sustained very substantial monetary losses as a result of fierce 'head-to-head' competition with the *News*. (Since 1980, these losses exceed \$56 million and are accelerating.) Most importantly for this case, there is an undisputed factual finding that there is *nothing* that the *Free Press* can do unilaterally to escape from its serious loss position. See slip op. 9 [Pet. App. 157a]. Given this fact, there is more than ample support for the finding that the *Free Press* is suffering losses that cannot likely be reversed and is in probable danger of financial failure. Slip op. 9-11 [Pet. App. 157a-159a].

Opposition by the Attorney General to Plaintiffs-Appellants' Emergency Motion for a Stay Pending Appeal, p. 5 (emphasis in original).

Thus, this case raises the legal issue of whether the minimal showing made here is sufficient to qualify a newspaper as being in "probable danger of financial failure" under the NPA. To be sure, the facts supporting each application will be different. But here the applicants were at competitive parity and had fought to a "virtual draw." Pet. App. 31a, 32a-85a; *see* Petition 6-7, 23. Therefore, the "failing newspaper" in future applications could not possibly be in any stronger position than the Free Press was here or it would be competitively superior. Because the facts supporting such an application will at least be as compelling as the facts here, any newspaper in a future application would qualify as failing if it could demonstrate that it has been losing money for a number of years and that it had no unilateral way to become profitable.

Since a paper with strong financial backing can create conditions that will meet that two-part test simply by inducing a price war and then declaring that it will not raise prices even if the JOA is denied, the Attorney General's novel interpretation of the NPA provides a roadmap to JOAs that jeopardizes the independence of newspapers in every city where newspapers still compete. Accordingly, the issue that petitioners have raised under the Newspaper Preservation Act also justifies plenary review by this Court.

3. Our final point relates to the Free Press's efforts to interject an irrelevant consideration into the case. Beginning with its question presented, ending with the concluding paragraph, and at several places in between, the Free Press threatens to cease operations if it is denied a JOA. Opposition i, 3, 7, 9, 22. The Administrative Law Judge rejected the Free Press's testimony on this point as not credible, and the Attorney General explicitly stated that he had not relied on similar statements placed in the record after the hearing. Pet. App. 104a-105a; Joint Appendix 59 n.4. *See* Petition 8.

Repetition of this self-serving threat does not make it relevant to whether the Court should grant the petition or to whether the decision below was correct. However, by relying on this threat, the Free Press highlights the basic flaw in the Attorney General's construction of the "failing newspaper" requirement, under which newspapers would have the ability to create a record that would be sufficient to obtain a JOA simply by inciting a price war and then relying on self-serving testimony of their chief officials. Surely, Congress never intended to give newspaper officials that kind of power when it enacted the NPA, and the importance attached by the Free Press to its threat to close only underscores the need for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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